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Supreme Court, U.S.
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No.

In the Supreme Court of the United States

OCTOBER TERM, 1997

JOHNNY BUTLER, ET AL.,
Petitioners

v.

DELORES SCOTT SULLIVAN, ET AL.,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

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26 pp

QUESTION PRESENTED

Pennsylvania's Workers' Compensation Act allows injured workers' employers, or their insurers, to withhold payments for medical bills pending the outcome of a utilization review to determine whether the treatment was reasonable and necessary. The issue presented is:

Whether the Due Process Clause requires injured workers' employers, or their insurers, to pay disputed medical bills before a determination that the medical treatment was reasonable and necessary?

LIST OF PARTIES

The petitioners[1] are Johnny Butler, Secretary of the Pennsylvania Department of Labor and Industry; Richard A. Himler, Director of the Bureau of Workers' Compensation within that Department; M. Diane Koken, Commissioner of the Pennsylvania Department of Insurance; Barbara Hafer, Treasurer of Pennsylvania; and Ralph R. Chase, Jr., Director of the State Workers' Insurance Fund of Pennsylvania.

Those respondents who are, like the petitioners, defendants in the District Court, are American Manufacturers Mutual Insurance Company, Commercial Union Insurance Company, Continental Casualty Company, Donegal Mutual Insurance Company, Hartford Fire Insurance Company, Insurance Company of North America, United States Fidelity and Guaranty Company, Zurich American Insurance Company, and the School District of Philadelphia.

Those respondents who are plaintiffs in the District Court are Delores Scott Sullivan, William Battle, Louis Baumgartner, Anthony Cancila, Christopher Costello, William C. Dillon, by his guardian and next friend Pauline Dillon, Terrence Ervine, Lisa Lex, Charles Matthews, Susan Hansen, the Philadelphia Area Project on Occupational Safety and Health and the Philadelphia Federation of Teachers.

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[1]The petitioners are all officials of the Commonwealth of Pennsylvania who have been substituted for their respective predecessors in office pursuant to Supreme Court Rule 35.3.

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 139 F.3d 158, and is reprinted at Pet. App.[2] 1a-40a. The opinion of the District Court dismissing the claims against some defendants for lack of state action is reported at 913 F.Supp. 895 and is reprinted at Pet. App. 41a-61a. The later opinion of the District Court, holding that Pennsylvania's statute does not violate the Due Process Clause, is not reported but is reprinted at Pet. App. 62a-82a.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on March 13, 1998. A petition for a writ of certiorari by American Manufacturers Mutual Insurance Company, et al., and a separate petition by the School District of Philadelphia, were docketed at Nos. 97-2000 and 97-2030, respectively, on June 11, 1998. This conditional cross-petition is filed in connection with those petitions, in reliance on the provisions of Supreme Court Rule 12.5, and within the time limits contained in that rule. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourteenth Amendment's Due Process Clause provides in relevant part that "[n]o State shall ... deprive any

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[2]"Pet. App." refers to the appendix to the petition filed by American Manufactures Mutual Insurance Company, et al. *See* the Statement of Jurisdiction *infra*.

person of life, liberty, or property without due process of law." U.S. Const., Amend. XIV, § 1.

2. The relevant provisions of the Pennsylvania Workers' Compensation Act, Pa. Stat. Ann., tit. 77, §§ 1 *et seq.* (Purdon 1992 & 1998-1999 Supp.), and its implementing regulations, 34 Pa. Code §§ 127.1 *et seq.*, are reprinted at Pet. App. 83a-103a.

STATEMENT OF THE CASE

This case concerns the process due when an employer challenges the reasonableness and necessity of an employee's medical treatment, for which the employer is obliged to pay under Pennsylvania's Workers' Compensation Act.

Petitioners, defendants in the District Court, are Pennsylvania officials responsible for administering portions of the Workers' Compensation Act.[3] They were sued by a group of plaintiffs, to whom we will refer collectively as "the claimants," comprising ten employees who claim workers' compensation benefits; an organization that advocates on behalf of injured workers[4]; and the Philadelphia Federation of Teachers, a labor

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[3]The petitioners include Pennsylvania's Secretary of Labor and Industry, and the Director of its Bureau of Workers' Compensation. The other petitioners are the State Insurance Commissioner and the State Treasurer, who, along with the Secretary of Labor and Industry, comprise the governing board of the State Workmen's Insurance Fund; and the Director of that Fund. *See* p. 4 n.7 *infra*.

[4]The Philadelphia Area Project on Occupational Safety and (continued...)

union representing employees of the Philadelphia School District. Pet. App. 9a-10a.[5] The claimants sued, in addition to the petitioners, several private insurance carriers that write workers' compensation policies, and the School District of Philadelphia, which is a self-insured employer for workers' compensation purposes.[6] Pet. App. 10a.

A. *Pennsylvania's Workers' Compensation System*. The Pennsylvania Workers' Compensation Act, Pa. Stat. Ann., tit. 77, §1, *et seq.* (Purdon 1992 & 1998-1999 Supp.), creates a mandatory no-fault insurance system to compensate employees for injuries suffered in the course of their employment. The Act provides the exclusive means of recovery against employers for work related injuries. *Id.*, § 481 (Purdon 1992). Thus, on the one hand, the Act displaces earlier tort remedies available to employees, but on the other hand, it makes compensation payable without regard to negligence. *Id.*, § 431 (Purdon 1998-1999 Supp.).

Under the Act, employers must either buy insurance to pay the compensation mandated by the Act, or demonstrate to the Department of Labor and Industry that they are financially able to self-insure. *Id.*, § 501 (Purdon 1998-1999 Supp.). Employers who do not self-insure may buy insurance from a

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[4](...continued)
Health.

[5] They brought this action on behalf of a class of similarly situated workers' compensation claimants, but the District Court dismissed the complaint without certifying a class. Pet. App. 11a.

[6]The insurers and the Philadelphia School District have filed separate petitions for certiorari. *See* p. ? *supra*.

private carrier, or from the State Workmen's Insurance Fund ("SWIF").[7] *Ibid.* If an employer or insurer becomes insolvent, its obligations are paid by the Workers' Compensation Security Fund, *id.*, § 1053 (Purdon 1992), which is administered by the Commonwealth but is funded by assessments on employers and insurers. *Id.*, §§ 1055, 1060 (Purdon 1992).

Compensation payable under the Act includes both wage replacement payments, *id.*, §§ 511-516 (Purdon 1992 & 1998-1999 Supp.), and — at issue in this case — payments for reasonable injury-related medical services. *Id.*, § 531 (Purdon 1998-1999 Supp.). An employer may decide to pay compensation on its own and file a notice of compensation payable with the Department; it may enter into an agreement with the injured employee to pay compensation; or it may contest the claim and, if unsuccessful, be ordered to pay by a Workers' Compensation Judge. *Id.*, §§ 731, 751 (Purdon 1992).

The Department of Labor and Industry administers the compensation system through its Bureau of Workers' Compensation. *Id.*, §§ 27, 711 (Purdon 1998-1999 Supp.). In addition to maintaining records on compensation agreements and notices of compensation payable, the Bureau provides mechanisms for resolving disputes over the right to

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[7]SWIF was created by the Act to provide workers' compensation coverage to any employers who request it, including those rejected or canceled by private carriers. The Fund is governed by a Board comprising the State Secretary of Labor and Industry, the State Insurance Commissioner, and the State Treasurer. The money in the Fund, however, comes solely from premiums paid by covered employers, and the Fund is administered "without liability to the Commonwealth." Pa. Stat. Ann., tit. 77, §§ 2602-2604 (Purdon 1998-1999 Supp.).

compensation. *See id.*, §§ 731-733, 751-775 (Purdon 1992 & 1998-1999 Supp.). These mechanisms include, among others, the utilization review process which is the subject of this action. *See id.*, §§ 531, 751-775 (Purdon 1992 & 1998-1999 Supp.); 34 Pa. Code §§ 127.208, 127.401-127.479.

Until 1993, Pennsylvania's system had no effective way to control medical costs. An employer who began paying for an employee's medical services had to keep paying for them until a Workers' Compensation Judge ruled that the medical treatment was unreasonable and unnecessary; and even then, it could not recover its payments from either the employee or the health care provider. *Moats v. Workmen's Compensation Appeal Board*, 138 Pa. Cmmw. Ct. 449, 588 A.2d 116 (1991). The employer's only recourse was to submit a claim to a fund — the Workmen's Compensation Supersedeas Fund — which was itself underwritten by assessments on employers and their insurers. *INA v. Workmen's Compensation Appeal Board*, 137 Pa. Cmmw. Ct. 393, 586 A.2d 500 (1991), *aff'd*, 533 Pa. 112, 619 A.2d 1356 (1993); *see* Pa. Stat. Ann., tit. 77, § 999 (Purdon 1992).

In 1993, the Pennsylvania General Assembly amended the Act to contain the spiraling medical costs which had become associated with this system. Act 1993-44 (Act 44); *see* Pet. App. 3a. Among the changes made by Act 44 was the creation of a utilization review process to challenge the reasonableness and necessity of medical treatment. Act 44, § 360 f.1(5)-(6), *codified at* Pa. Stat. Ann., tit. 77, § 531(5)-(6) (Purdon 1998-1999 Supp.), *reprinted at* Pet. App. 90a-91a.

Under Act 44, employers must pay for treatment within 30 days of the submission of the bill by the provider, unless they dispute the reasonableness and necessity of the treatment through the utilization review process. *Id.*, § 531(5) (Purdon 1998-1999

Supp.). This process begins when an employer or insurer[8] submits a request for utilization review of specified treatment to the Bureau of Workers' Compensation, and serves a copy on the employee and the health care provider. 34 Pa. Code §§ 127.451, 127.452.

At that point the employer or insurer may suspend payment for the challenged treatment. Pa. Stat. Ann., tit. 77 § 531(5) (Purdon 1998-1999 Supp.); 34 Pa. Code § 127.208. Nothing in the statute or regulations, however, requires suspension, nor are medical providers required to stop giving the challenged treatment.[9] Providers may not, however, seek payment for such treatment from the employee. Pa. Stat. Ann., tit. 77, § 531(7) (Purdon 1998-1999 Supp.).

The Bureau randomly assigns requests to Utilization Review Organizations ("URO's"), organizations of impartial health care providers authorized by the Secretary of Labor and Industry to conduct utilization reviews, *id.*, § 531(6)(i) (Purdon 1998-1999 Supp.); and notifies all parties of the assignment. 34 Pa. Code §127.453.

The actual review by the URO was described by the District Court as "extremely focused," Pet. App. 73a, and by the Court of Appeals as "narrowly tailored." Pet. App. 6a. The only issue before the URO is whether the treatment is reasonable and necessary for the medical condition being treated. 34 Pa. Code § 127.470. The URO must assume that the condition being

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[8]An employee may also request utilization review.

[9]As the Court of Appeals noted, the claimants allege that some medical providers continue treatment after payments are withheld and some do not. Pet. App. 27a.

treated is related to a work-related injury. *Ibid.* It may not decide whether the employee is still disabled; whether he or she has attained maximum medical improvement; or whether the provider's fees are reasonable. *Ibid.* Its review must be conducted by a person licensed in the same profession and having the same specialty is the provider, *id.*, § 127.466, and who applies generally accepted treatment protocols. *Id.*, § 127.472.

Finally, the URO may not itself examine the employee, or obtain such an examination. *Id.*, § 127.458. Rather, its review must be based only on the records of the treating provider, and it must give the provider the opportunity to discuss the challenged treatment. *Id.*, §§ 127.461, 127.469.

The URO must complete its review and issue a written decision within 30 days of receiving the provider's records. *Id.*, § 127.465. The written decision must contain findings, conclusions, a detailed explanation of the reasons for the conclusions, and citations to generally accepted treatment protocols and medical literature, as appropriate. *Id.*, § 127.472. It is then sent to the Bureau and served on all parties. *Id.*, § 127.476. The employer or insurer pays for the initial review regardless of the outcome or who requests it. *Id.*, § 127.477. If the URO finds the treatment to be reasonable and necessary, the employer or insurer must pay the provider's bills even if it seeks further review. *Id.*, § 127.208(e).[10]

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[10]At the time this litigation began, the losing party could seek reconsideration by another utilization review organization. Act 44, §306(f.1). The process on reconsideration was essentially the same as on the initial request. *See* Pet. App. 8a, 64a-65a. This step was eliminated by the legislature in 1996. *See* Act 1996-57, §4; Pet. App. (continued...)

Any party dissatisfied with the URO's decision may proceed to a hearing *de novo* before a Workers' Compensation Judge. Pa. Stat. Ann., tit., 77 § 531(6)(iv) (Purdon 1998-1999 Supp.). Employees who prevail are entitled to an award of benefits due plus 10% interest, plus litigation costs. *Id.*, §§ 717.1(a), 996 (Purdon 1998-1999 Supp.). These decisions are appealable in turn to the Workmen's Compensation Appeal Board, an administrative appellate tribunal that operates independently within the Department of Labor and Industry, *id.*, §§ 701, 853 (Purdon 1992 & 1998-1999 Supp.), and then to Pennsylvania's Commonwealth Court. Pa. Stat. Ann., tit. 42, § 763 (Purdon 1981).

B. *Proceedings in the District Court.* In their original complaint, the claimants alleged that the utilization review process embodied in the 1993 amendments to the Act violated the Due Process Clause, because it permitted employers, pending the utilization review, to suspend payments for medical services without giving employees notice and a hearing beforehand. Pet. App. 41a.

The insurers moved to dismiss, arguing that when they invoked the utilization review process and withheld payment, they were not state actors. The District Court granted the insurers' motion. Pet. App. 41a-60a. Relying on *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614 (1991), *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982), and *Jordan v. Fox, Rothschild O'Brien & Frankel*, 20 F.3d 1280 (3d Cir. 1994), the District Court held that the insurers were not state actors because "the decision to cease paying medical benefits is entirely up to

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[10](...continued)
- 9a, 65a-66a.

insurers acting independent of any state involvement whatsoever."Pet. App. 59a. The District Court went on to note that the Commonwealth did not promote, support or encourage the insurers' decision; rather, it merely provided a remedy. *Ibid.*[11]

The claimants then amended their complaint to add new due process claims.[12] The remaining defendants — the petitioners and the Philadelphia school district — moved to dismiss the Amended Complaint on the ground that it failed to state a cause of action, and the District Court granted their motions. Pet. App. 81a, 82a.

The District Court first turned to whether the invocation of the utilization review process deprived the claimants of a protected property interest. The District Court concluded that a deprivation did occur (although it did not identify the state action that caused the deprivation). Pet. App. 67a-68a. The District

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[11]At about the same time, the Philadelphia school district also moved to dismiss the complaint against it, and the claimants moved for partial summary judgment against the school district. The District Court held that the record did not permit it to resolve the issues raised by these motions. Pet. App. 59a-60a.

[12] The amended complaint alleged that the petitioners' had failed to adopt regulations giving Workers' Compensation Judges' adequate guidance on how to decide appeals from decisions of the URO's. *See* Pet. App. 79a-80a. The amended complaint also contained a claim relating to the reconsideration procedure which was eliminated in 1996. *See* p. 7 n.10, *supra*. The District Court held for the petitioners on both of these claims, Pet. App. 76a-80a. The Court of Appeals affirmed the District Court's decision on the adequacy of the regulations, Pet. App. 33a-34a, and remanded the reconsideration issue to the District Court for further proceedings. Pet. App. 34a-35a. Neither issue is before the Court in this petition.

Court then addressed the adequacy of the procedures provided, by applying the balancing test set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976). While the District Court acknowledged that the claimants' interest in uninterrupted medical benefits was significant, it concluded that this interest did not outweigh the other *Mathews* factors so as to require additional procedures. Pet. App. 68a-75a.

The District Court held that the risk of erroneous deprivations was small, and adequately guarded against by the existing procedures. Pet. App. 71a-75a. In doing so, the District Court laid particular stress on the "extremely focused" nature of the utilization review, Pet. App. 73a; its reliance on "routine, standard and unbiased" medical reports which raised no issues of credibility or veracity, Pet. App. 72a, *quoting Richardson v. Perales*, 402 U.S. 389, 407 (1971); and its confinement to the medical records and testimony of the provider whose treatment was being challenged. Pet. App. 73a. Finally, the District Court concluded that the government's interest in moderating the high cost of workers' compensation was significant and weighed in favor of sustaining the statutory scheme. Pet. App. 75a.

C. *Proceedings in the Court of Appeals.* The Court of Appeals first addressed the issue of whether the private insurers were state actors, and held that they were. Pet. App. 12a-19a. In the Court of Appeals' view, the Commonwealth had simply delegated to the insurers its own obligation to pay workers' compensation benefits, in much the same way that, in *West v. Atkins*, 487 U.S. 42 (1988), the state had delegated to a contract physician its own obligation to provide medical care to

prisoners.[13] Pet. App. 16a. Thus,

> when [insurers] act under the ... Workers' Compensation system, they are providing public benefits which honor State entitlements. In effect, they become an arm of the State, fulfilling a uniquely governmental obligation under an entirely state-created, self-contained public benefit system.

Pet. App. 14a-15a. The insurers were "inextricably entangle[d] ... in a partnership with the Commonwealth such that they become an integral part of the state in administering the statutory scheme," Pet. App. 19a, and were therefore "bound by the constraints of due process." Pet. App. 19a, n.22.

The Court of Appeals then turned to the merits of the due process challenge.[14] Applying in its turn the *Mathews* balancing test, the Court of Appeals first defined the private interest at stake solely in terms of "the relief that the medical treatment provides to injured employees." Pet. App. 27a. The Court of Appeals noted in passing "the conflicting private interest of the

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[13]The Court of Appeals pointed out that, if an insurer or employer becomes insolvent, the Commonwealth guarantees the payment of its obligations through the Workers' Compensation Security Fund. Pet. App. 14a, n.18. The court did not mention that this Fund is itself funded solely by assessments upon employers and insurers. *See* p. 4, *supra*.

[14]As an initial matter, the Court of Appeals first held that the notice an employee received prior to the suspension of payment to his or her provider was constitutionally inadequate. Pet. App. 21a-25a. Petitioners do not challenge this holding.

insurance companies ... in not paying for unnecessary and/or unreasonable medical treatment," *ibid*, but made no further mention of it.

The Court of Appeals then discussed the risk that the employee — but not the employer or its insurer — would be erroneously deprived of his or her interest. In this regard, the Court of Appeals acknowledged what it called the "narrowly tailored" nature of utilization review, Pet. App. 6a, and agreed with the District Court that

> [u]tilization review is premised upon "routine, standard, and unbiased medical reports," ... from the treating physician, reviewed by a physician in the same speciality who assesses the case based upon generally accepted medical protocols, principles, and practices. Issues of credibility and veracity are less likely to be an issue in such a case.

Pet. App. 31a. The Court of Appeals acknowledged as well the requirement that the employee's provider be given the opportunity to discuss the challenged treatment, Pet. App. 29a, but nevertheless held that the procedure was constitutionally deficient because it did not provide for the employee to submit a *personal* statement. The Court of Appeals believed that, without the employee's "personal testimony in writing as to the reasonableness and necessity of the disputed treatment, ... the risk of erroneously terminating the employee's medical benefits is too high." Pet. App. 31a.

The Court of Appeals then considered the governmental interest at stake, which it characterized as "ensuring that only truly disabled individuals are receiving reasonable and necessary

medical treatment,"[15] and as "containing the rising costs of medical care and insurance payments." Pet. App. 29a-30a. These interests, however, in the Court of Appeals' view, did not outweigh the interests of the claimants.

The Court of Appeals accordingly held that, to remedy the defects it perceived in the Act, "at a minimum, an employee must be given ... an opportunity and time to submit a personal statement in writing regarding the employee's view of the reasonableness and/or necessity of the disputed medical treatments." Pet. App. 33a.

REASONS FOR GRANTING THE WRIT

I. THE PROPER APPLICATION OF DUE PROCESS PRINCIPLES TO WORKERS' COMPENSATION PROGRAMS PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, REVIEWED BY THE COURT.

The administration of workers' compensation programs affects literally millions of people in all parts of the Nation. All fifty States, the District of Columbia, Puerto Rico and the Virgin Islands have enacted workers' compensation laws. *See* U.S. DEPARTMENT OF LABOR, EMPLOYMENT STANDARDS ADMINISTRATION, OFFICE OF WORKERS' COMPENSATION PROGRAMS, *State Workers' Compensation Laws* (January 1998).

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[15]This characterization is inaccurate. Utilization review does *not* decide whether an individual is "truly disabled," but only whether the treatment received is reasonable and necessary for the condition being treated. *See* p. 7, *supra*.

In addition, the federal government has established workers' compensation programs for its own employees through the Federal Employees Compensation Act, 5 U.S.C. §§ 8101 *et seq.*, and for workers in the maritime industry through the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 *et seq.* *See* UNITED STATES GENERAL ACCOUNTING OFFICE, *Workers' Compensation: Selected Comparisons of Federal and State Laws* (April 1996).

As one commentator puts it, workers' compensation laws

> represent a compact between employers and employees to replace a fault-based occupational injury compensation system with a no-fault system: where the employee gives up common law rights to sue the employer for negligence in return for the employer's acceptance of strict liability for workplace injuries and participation in a state-directed benefit system.

G. Tracy, *The Importation of Managed Care to the Workers' Compensation System: Time for Re-evaluation and Re-direction*, 9 No. 7 HEALTH LAW. 16 (1997). In Pennsylvania as in other States,

> employers are required to provide a state-mandated, state-defined set of medical and indemnity benefits for each employee experiencing accidental injury or occupational disease.... Employers participate ... by purchasing ... insurance, by self-insuring, or in certain states by participating in a state workers' compensation fund.

Ibid; see p. 3 *supra*. Workers who are injured on the job, then, are owed compensation not by the government, but by their employers.

The Court of Appeals, however, approached this case as if it were a classic instance of the denial of *government* benefits, in the mold of *Goldberg v. Kelly*, 397 U.S. 254 (1970) or *Mathews v. Eldridge*, 424 U.S. 319 (1974). According to the Court of Appeals, when employers or their insurers provide workers' compensation benefits, "they are providing *public* benefits which honor *State* entitlements ... fulfilling a uniquely *governmental* obligation." Pet. App. 14a-15a (emphases added).

The Court of Appeals could hardly have been more explicit, or more wrong. Workers' compensation programs are not welfare programs. Workers' compensation programs, like the fault-based tort systems they replaced, govern the relationships between *private parties* — employers and employees.

The Court of Appeals' erroneous conception of workers' compensation as a "public benefit" and "State entitlement," Pet. App. 14a-15a, infected its analysis of both the state action issue and the due process issue. Because the Court of Appeals incorrectly viewed employers and their insurers as "fulfilling a uniquely governmental obligation," Pet. App. 15a, it was led to characterize them incorrectly as state actors within the meaning of 42 U.S.C. § 1983. Having done so, it then improperly disregarded their interests as private parties when it applied the *Mathews* factors. Pet. App. 27a. *Cf. Connecticut v. Doehr*, 501 U.S. 1 (1991) (due process analysis, when applied to dispute between two private parties, must take into account the interests of both).

Workers' compensation programs are a near-universal

feature of American society and, as we discuss below, their proper treatment under the Due Process Clause has been a recurrent issue to which the lower courts have given varying answers. The Court should review this case to provide the necessary guidance.

II. THIS QUESTION HAS GENERATED PERSISTENT CONFLICTS AMONG THE LOWER COURTS.

The Court of Appeals' resolution of the intertwined issues of state action and due process — as the petition in *American Manufacturers Mutual Insurance Company, et al. v. Sullivan, et al.*, No. 97-2000 (filed June 11, 1998), discusses in more detail, *see id.*, p. 14-20, 26-28 — demonstrates the persistent conflicts which these issues have generated between and among the state and federal courts. The Court of Appeals' state action decision puts it at odds both with other federal courts, and with the state courts of Pennsylvania. *See, e.g., Barnes v. Lehman*, 861 F.2d 1383 (5th Cir. 1988) (no state action when insurer terminated workers' compensation disability benefits); *Fleming v. Workers' Compensation Comm'n*, 878 F.Supp. 852 (E.D. Va. 1995), *aff'd*, 78 F.3d 578 (4th Cir. 1996) (no state action when insurer suspended benefits); *Henderson v. Workmen's Compensation Appeal Board*, 69 Pa. Cmmw. Ct. 613, 452 A.2d 277 (1982) (same).

Similarly, its decision on due process further deepens a conflict which was already pervasive. *Cf., e.g., Cryder v. Oxendine*, 24 F.3d 175 (11th Cir. 1994) (no due process violation where insurer suspended worker' compensation payments, without prior hearing, on basis of report of treating physician); *Sauceda v. Department of Labor & Industry*, 917 F.2d 1216 (9th Cir. 1990) (no due process violation where benefits suspended,

without prior hearing, for failure to attend required programs); *with, e.g., Beckler v. North Dakota Workers' Compensation Bureau*, 418 N.W.2d 770 (N. Dak. 1988) (due process requires hearing before suspension of benefits); *Carr v. SAIF Corp.*, 670 P.2d 1037 (Or. 1983) (same).

The Court should review this case to resolve these conflicts.

CONCLUSION

The Court should grant this petition and, upon review, reverse the judgment of the Court of Appeals.

Respectfully submitted,

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No. 98-161

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1997

JOHNNY BUTLER, et al.,
Petitioners

v.

DELORES SCOTT SULLIVAN, et al.,
Respondents

ON CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

The Pennsylvania Workers' Compensation Act, 77 Pa. Stat. Ann. Sections 1, *et seq.*, creates a public benefit in workers' compensation benefits, including wage replacement and medical benefits. These benefits constitute a recognized property interest under Pennsylvania law. Pursuant to Sections 306(f.1)(5) and (6), 77 P.S. Sec. 531(5) and (6) of the Act, insurance companies providing workers' compensation insurance to Pennsylvania employers are delegated the power by the state to stop injured workers' medical benefits without notice or a prior opportunity to be heard. A counterstatement of the issues raised by the supporting Petition for review characterized as a Conditional Cross-Petition for Writ of Certiorari filed by the Commonwealth of Pennsylvania is:

1. Is the petition for allowance of review filed by the Commonwealth of Pennsylvania, and characterized as a Conditional Cross-Petition for Writ of Certiorari, in reality a petition filed in support of the petitions for a Writ of Certiorari filed on behalf of the American Manufacturers Mutual Insurance Company, *et al* (No. 97-2000) and the School District of Philadelphia (No. 97-2030) and therefore untimely in accordance with Rule 12.6 of the Rules of this Court?

2. Do Sections 306(f.1)(5) and (6) of the Pennsylvania Workers' Compensation Act, which provide for the cessation of workers' compensation medical benefits without notice to the injured worker or any pre-deprivation opportunity to be heard, violate the injured workers' right to due process of law?

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COUNTERSTATEMENT

The Commonwealth of Pennsylvania ("Commonwealth") has filed an untimely request for review supporting the due process arguments of earlier and timely filed Petitions which it has characterized as a Conditional Cross-Petition for Writ of Certiorari. It has taken this action to avoid the clear mandate of Rule 12.6 which states that any respondent who supports the position of a petitioner shall meet the petitioner's time schedule for filing documents, except that a response supporting the petition shall be filed within 20 days after the case is placed on the docket, and that time will not be extended. As more fully set forth below, it is clear that the Commonwealth's Conditional Cross-Petition must be stricken as untimely.

More importantly to the Court's decision regarding review, however, the Commonwealth raises no new arguments regarding the singular issue of due process cursorily examined by its petition to this Court and in fact, cites only cases which fully support the holding of the Court below. *Cryder v. Oxendine*, 24 F.3d 175 (11th Cir. 1994); *Sauceda v. Department of Labor and Industry*, 917 F.2d 1216 (9th Cir. 1990); *Beckler v. North Dakota Workers' Compensation Bureau*, 418 N.W. 2d. 770 (N. Dak. 1988); and *Carr v. SAIF Corp.*, 670 P.2d 1037 (Or. 1983).

Procedural History

As more fully set forth in their Brief in Opposition filed in response to the petitions for Certiorari filed by ten insurance companies ("Insurers")[1] and the School District of Philadelphia

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[1] Manufacturers' Mutual Insurance Co., Commercial Union Insurance Co., Continental Casualty Co., Donegal Mutual Insurance Co., Hartford Fire Insurance Co., Insurance Company of North America, United States Fidelity and Guaranty Company, and Zurich

("School District"),[2] the individual plaintiffs in the district court action were ten seriously injured workers who had their workers' compensation medical benefits stopped by unsupported requests for utilization review by their employers or their employers' insurer without notice or an opportunity to be heard before their property right in those benefits was abrogated. The United States Court of Appeals for the Third Circuit upheld the injured workers' challenge to Sections 306(f.1)(5) and (6) of the Pennsylvania Workers' Compensation Act ("the Act") holding, in pertinent part, that the supersedeas provisions were violative of "the dictates of due process by not affording disabled employees notice or an opportunity to be heard before their medical benefits are suspended." App. 33a.[3]

The Insurers and the School District filed motions to stay the mandate on April 2, 1998. By order dated April 21, 1998, the Third Circuit denied the motions and the mandate issued accordingly. Since then, the Commonwealth has modified its procedures without significant difficulty or expense. Claimants now receive pre-termination notice that utilization review has been filed, a description of the reasons for the request for review, and a pre-termination opportunity to submit written testimony to the utilization reviewer. While negotiations are continuing as to how the system should be further modified in light of the Third Circuit's decision, the significant due process concerns that prompted this litigation have been largely corrected.

Insurance Company, designated herein as "Insurers," filed a Petition for Writ of Certiorari, No. 97-2000, on June 11, 1998.

[2] No. 97-2030, filed June 11, 1998.

[3] All citations to the Appendix refer to the Appendix attached to the petition filed under Case No. 97-2000.

On July 11, 1998, both the Insurers and the School District filed timely Petitions for Certiorari requesting that this Court review, *inter alia,* the due process violation holding of the Third Circuit. The Commonwealth did not seek a stay of the Third Circuit's mandate, did not file a petition within the 90 day period after entry of judgment as set forth in Rule 13.1, and did not comply with the 120 day mandate for a response supporting the original petitions as set forth in Rule 12.6. Instead, recognizing that it would not meet the deadlines imposed by those rules, it filed on July 10, 1998 a request for relief which it mischaracterizes as a "Conditional Cross-Petition" under Rule 12.5. That Rule allows a respondent to file a non-supporting petition (i.e., one dependent on the Court's grant of review of the timely filed Petition) within 30 days after the case has been placed on the docket. The Commonwealth's Petition does not qualify as a non-supporting Petition under the rules, and is untimely.

REASONS FOR STRIKING OR DENYING THE CONDITIONAL CROSS-PETITION

I. THE UNTIMELY SUPPORTING PETITION FILED BY THE COMMONWEALTH SHOULD BE STRICKEN

As recited above, the Commonwealth did not file its supporting petition until July 10, 1998, which was 119 days from the date the decision was docketed by the Court. Rule 12.6 of the Rules of the Supreme Court of the United States specifically provides that:

> any respondent who supports the petitioner shall meet the petitioner's time schedule for filing documents, except that a response supporting the petition shall be filed within 20 days after the case is placed on the docket, and that time will not be extended.

The Commonwealth's submission, while characterized as a "Conditional Cross-Petition for Writ of Certiorari" is clearly a document "supporting" the positions espoused by both the Insurers (No. 97-2000) and the School District (No. 97-2030). It raises no new issue or prayer for relief. It provides no new insight into the reasons cited by either the Insurers or the School District for granting the underlying Writ. Relying extensively and broadly on the Petition filed by the Insurers (No. 97-2000) and citing pages 14 through 20 and 2 through 28 of that Petition, the Commonwealth, without any analysis, suggests that the due process and state action holdings of the Third Circuit are in conflict with other jurisdictions and should be reviewed by the Court so as to provide guidance for similar claims in the future. The Commonwealth's total discussion of this complex issue is encapsulated in just four pages of broad principles, mimicking the content of the earlier filed petitions. Tellingly, the Commonwealth only cites two cases not cited and fully analyzed by the original Petitioners (i.e., *Beckler* and *Carr*), and both of those cases fully support the position of the injured workers on the issue of due process.

While Rule 12.5 does permit the filing of a true Cross-Petition within 30 days of the date the case is docketed, the document filed by the Commonwealth is neither a request for additional relief nor a suggestion of a new ground for the imposition of such relief, as contemplated by that rule. It is without question "a response supporting" the earlier and timely filed petitions and, in accordance with Rule 12.6, is clearly filed out of time.

Accordingly, it is requested that the conditional Petition filed by the Commonwealth be stricken.

II THE COMMONWEALTH HAS SUGGESTED NO REASON WHY THIS COURT SHOULD REVIEW THE DUE PROCESS HOLDING OF THE THIRD CIRCUIT.

A. Rights to Workers' Compensation Benefits Are Public, Not Private, in Nature.

Assuming that the request for relief of the Commonwealth was timely filed, the Cross-Petition provides no basis for review by this Court. Arguing that the "application of due process principles to workers' compensation" laws presents "an important question of federal law" (Commonwealth Cross-Petition ("Cross-Pet.") at 13), the Commonwealth proffers only that: (1) all states have workers' compensation laws, *id.*; (2) Pennsylvania employers (and not the state) are required to provide benefits by state law (Cross-Pet. at 14); and (3) therefore, in Pennsylvania, workers' compensation benefits are not a public benefit to which due process mandates should apply. This perversion of Socratic logic provides no basis for review.

First, the decision of the Court below was highly dependent on the unique nature of the Pennsylvania workers' compensation system and its utilization review procedures. While most states have adopted workers' compensation laws, those statutorily mandated systems differ dramatically from state to state. Such differences preclude the uniformity of analysis necessary to require this Court's review.

Second, the system created by statute is one that guarantees the right to compensation benefits, including medical treatment, to workers injured on the job. Unlike the private provision of health care or automobile insurance, workers' compensation benefits constitute an entitlement guaranteed to every Pennsylvania worker and enforced through the Commonwealth's police power. *Bible v. Commonwealth*, 548 Pa. 247 (Pa. 1997). The right to these benefits cannot be bargained away and employees cannot opt out of the system. An

injured employee in Pennsylvania has a statutorily guaranteed right to those benefits, thereby providing a Fourteenth Amendment protectable property right. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972).[4] The right to those benefits most certainly is not an issue arising from a dispute between two private parties as suggested by the Commonwealth.[5]

B. There Is No Conflict Between and Among the Federal and State Courts.

The Commonwealth, relying entirely on the analysis of the Insurers in their Petition (No. 97-2000), also suggests conflicts "between and among state and federal courts" (Cross-Pet. at 16). Putting aside the fact that this is not the ultimate test for determining whether a matter is appropriate for review by this Court, the Commonwealth cites only four cases to support this "conflict" theory. Each of these cases fully supports the reasoning and conclusions reached by the Third Circuit on the issue of due process.

In a holding almost identical to the Third Circuit's in the present case, the Supreme Court of North Dakota held that an injured

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[4] That workers' compensation benefits are protected property for purposes of the 14th Amendment was never contested by any party below. For a fuller discussion as to why workers' compensation benefits in Pennsylvania are public benefits, see respondents' Brief In Opposition in 97-2000 and 97-2030, at 7-9.

[5] The Commonwealth directly copied the Insurers' argument that the Third Circuit's decision fails to accord any weight to the private interest of the Insurers and is thus in violation of this Court's supposed pronouncements in *Connecticut v. Doehr*, 501 U.S. 1 (1991). For all the reasons set forth in the Respondent's Brief in Opposition in 97-2000 and 97-2030 at 28 n.20, this argument is meritless.

worker was entitled to notice and the opportunity to be heard (albeit that a formal evidentiary hearing was not required) before his or her benefits could be denied:

> Our analysis therefore focuses on the process due Beckler before the Bureau may terminate his disability benefits. Due process does not insist upon inflexible procedures uniformly applicable to every imaginable situation. But, minimum components of due process mandate that, except in unusual circumstances, a deprivation of liberty or property be preceded by some form of notice of the contemplated action and an opportunity for a hearing appropriate to the nature of the case. Memphis Light, Gas & Water Division v. Craft, 436 U.S. 1, 98 S.Ct. 1554, 56 L.Ed.2d 30 (1978); Mathews v. Eldridge, supra; Gross v. Lopez, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975); Goldberg v. Kelly, supra; see Friendly, "Some Kind of Hearing," 125 U.Pa.L.Rev. 1267 (1975).

Beckler v. North Dakota Workers' Compensation Bureau, 48 N.W. 2d. at 773.

Citing to *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1 (1978) and *Mathews v. Eldridge*, 424 U.S. 319 (1976) and a number of state and federal decisions, that Court held that the absence of such minimal safeguards would violate the due process mandates of the United States and North Dakota constitutions:

> While Beckler must be accorded an opportunity to respond to the termination of disability benefits, we do not expect a pretermination evidentiary hearing with an occasion to confront witnesses. In our view an evidentiary hearing before termination would

> unduly burden the governmental interest because medical records will usually resolve whether the claimant can work. Rather, we believe that opportunity to respond should be limited to a written submission as an initial check against an erroneous decision. In this respect our holding rests in part on the Bureau conducting a timely post-termination evidentiary hearing and on the Bureau's authority to award retroactive disability benefits. Because the Bureau did not provide Beckler with necessary pretermination procedures, we hold that he is entitled to the benefits he seeks.

Id. at 774 (footnote omitted, citations omitted).

In *Carr v. SAIF Corporation*, *supra*, the Oregon Court of Appeals also rejected several suggestions made by the Commonwealth of Pennsylvania herein, holding that (1) an injured worker's right to continuing benefits was a protectable property interest under the Fourteen Amendment, and (2) he or she was entitled to procedural presuspension safeguards including adequate notice and an opportunity to be heard. *Carr v. SAIF Corporation*, 670 P.2d 1037 at 1042, 1046. The Oregon Court also held that the acknowledged intervention, almost identical to the scheme in Pennsylvania, constituted governmental action raising due process protections. *Id.* at 1040.

In *Cryder v. Oxendine*, 24 F.3d 175 (11th Cir. 1994) and *Sauceda v. Department of Labor and Industry of the State of Washington*, 917 F.2d 1216 (9th Cir. 1990), both courts held only that under the pre-termination procedures provided by the controlling statutes, the injured worker *was* provided with adequate safeguards (including in each case adequate notice and an opportunity to respond) which comported with the dictates of due process. In each case, the Court's analysis hinged on the unique characteristics of each state's system. *Cryder*, 24 F.2d. at 177 ("Due process is a flexible concept

that varies with the particular situation. The question before us is whether the Georgia system satisfies the fundamental requirement of due process by providing a claimant an opportunity to be heard 'at a meaningful time and in a meaningful place.' *Mathews [v. Eldridge]*, 424 U.S. [319] at 333, 96 S.Ct. at 902 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965). We believe it does"); *Sauceda*, 917 F.2d at 1219 ("a self-insured employer cannot suspend benefits without the department's approval. And the Department must inform a claimant of its decision to suspend benefits with its reasons, and give him sixty days to protest or request reconsideration.")(statutory citations omitted).

Accordingly, it is again urged that, on the facts of the present case, given the exclusiveness of the state's control over the administration of the system, the clarity of the public nature of the benefits at issue, and the fact that those benefits constitute constitutionally protected property, the Third Circuit's decision that the utilization review procedures are constitutionally deficient for their failure to accord pre-deprivation notice or opportunity to be heard of any kind was correct. A "legislature ... may not constitutionally authorize the deprivation of a [property] interest, once conferred, without appropriate procedural safeguards." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432 (1982). Review should therefore be denied.

CONCLUSION

For all the reasons stated herein, Respondents-Injured Workers request that the Conditional Cross-Petition of the Commonwealth of Pennsylvania be stricken as untimely or denied on its merits.

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